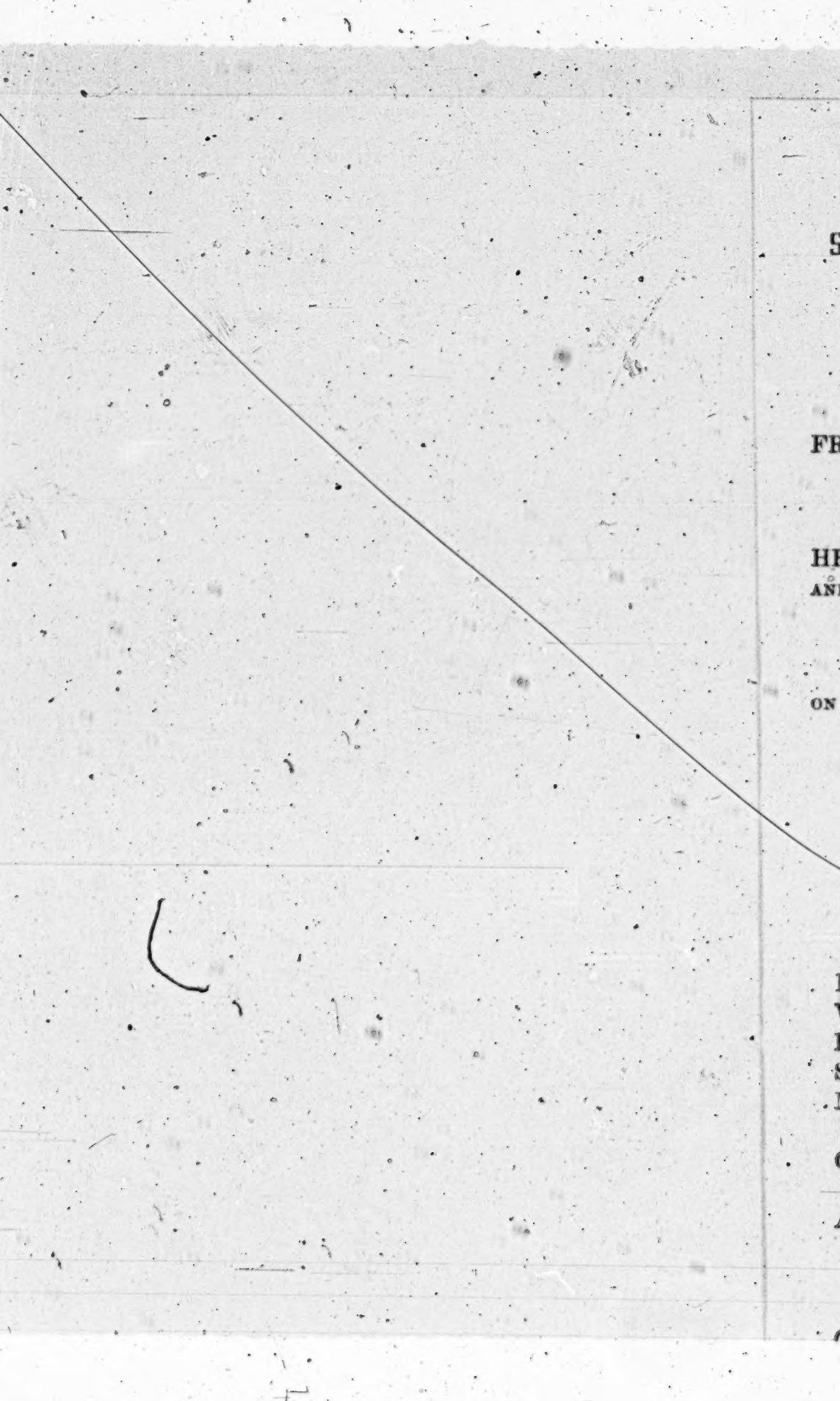


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UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 35

ANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE,
Petitioners,

vs.

RMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,
Respondent

VRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 35

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, AND HARRY CARLISLE,
Petitioners,

vs.

HERMAN R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,
Respondent

BRIEF FOR PETITIONERS

This case is here on Writ of Certiorari allowed by an order filed October 8, 1951 (R. 353)[1] to review the decisions and judgments of the United States Court of Appeals for the Ninth Circuit, rendered March 13, 1951 (R. 350-3), affirming in a single opinion orders of the United States District Court in and for the Southern District of California, Central Division, rendered January 22, 1951 (R. 65-6; 107-8; 144; 175-6), denying petitioners' respective petitions for habeas corpus theretofore issued.

Opinions Below

The cause herein was before the District Court and the Court of Appeals upon two occasions. The initial opinion.

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[1] Meaning, Transcript of Record, pages 350 to 353, inclusive.

of the District Court (R. 18) is reported in *Ex Parte Carlson*, 94 F. Supp. 18. The initial opinion of the Court of Appeals (R. 28; 111; 149; 180) is reported in *Carlson* v. *Landon*, 186 F. (2d) 183; related case, *Mangoang* v. *Boyd*, 186 F. (2d) 191. The District Court filed no written opinion in rendering its second judgment (R. 65-6; 107-8; 144; 175-6). The second opinion of the Court of Appeals (R. 331) is reported in *Carlson* v. *Landon*, 187 F. (2d) 991.

Jurisdiction

The judgments of the Court of Appeals were rendered and filed March 13, 1951 (R. 350-3). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 2101 (c).

Statute Involved

The statute involved is section 20 (a) of the Immigration Act of February 5, 1917 (39 Stat. 890, 8 U. S. C. 156 (a)), as amended by section 23 of the Internal Security Act of 1950 (Pub. Law 831, 81st Cong. 2d Sess., 64 Stat, —). In material parts the statute, as amended, provides as follows:

> "Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody, or (2) be released under bond in the amount of not less than $500.00, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole that the alien shall be producted, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made."

Statement of the Case

These are habeas corpus proceedings. Petitioners are aliens, arrested in deportation proceedings October 21, 1950[2] and detained in custody and denied bail by the respondent District Director of the United States Immigration and Naturalization Service, Department of Justice, upon the order of the acting Commissioner of Immigration and Naturalization as delegee of the Attorney General (R. 42; 91; 132; 162).

Previously, between October, 1947 and June, 1950, on dates not related to one another, deportation proceedings were initiated against each of the petitioners by service upon them of warrants of arrest charging each with being

> ". . . an alien who is a member of and affiliated with an organization, association, society and group that believes in, advises, advocates and teaches the overthrow by force or violence of the Government of the United States, in violation of the Act of October 16, 1918" (R. 45; 94; 134-5; 165).

Each of the petitioners was then admitted to bail under the former statute, the sums fixed varying between $1000.00 and $5000.00 (R. 45; 95; 135; 166). Each of the petitioners complied faithfully with all terms of his bond. It is undisputed by the respondent that each petitioner

> ". . . at all times . . . has been, now is, and will continue to be, available to appear and will appear at any and all hearings and other lawful proceedings in connection with the determination of his deportability;" (R. 5-6, 49; 73, 79; 156, 170; semble 115-6, 139).

On October 21, 1950, respondent caused petitioners Carlson, Carlisle, Hyun to be rearrested upon the original warrants notwithstanding their record of obedience to bail

---

[2] October 23, 1950 in the case of petitioner *Stevenson*.

(R. 4, 117, 154) and from that date until their release by this court pending certiorari proceedings, detained them absolutely and without right to bail in any amount (R. 5; 117; 156). On October 23, 1950, respondent similarly arrested petitioner Stevenson (R. 71-2) and thereafter confined her without bail like the others.

Petitioners filed their respective petitions for habeas corpus below on October 24, 1950, and writs were issued by the District Court.

On October 31, 1950 respondent caused each of petitioners to be served with new warrants of arrest, charging each petitioner to be deportable on the ground of being

> ". . . after entry . . . an alien who was a member of the Communist Party of the United States of America;" (R. 4; 72; 117; 155).

This change in the warrant charge rendered the original writs technically moot. Accordingly, petitioners filed new petitions November 2, 1950 and new writs issued. Thereupon, in answer to the issued writs, respondent filed returns in each of the proceedings, justifying his detention of each of petitioners upon the ground in each instance

> "That there is reasonable cause to believe that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States." (R. 11; 79; 125).

The District Court held this justification sufficient and discharged the writs (R. 24; 86), filing a written opinion (R. 18). Upon appeals from those orders the Court of Appeals, in its first decision herein, 186 F. 2d 183, held the returns insufficient as a matter of law and remanded for further proceedings (R. 28; 111; 149; 180).

Thereafter, the respondent filed in each case a new return (R. 40; 89; 130; 160) with an annexed affidavit (R.

45; 95; 135; 166) and, after traverse, a supplemental return (R. 55; 99; 139; 171). In these returns and affidavits the District Director justified his incarceration of petitioners upon the ground that he possessed evidence tending to establish that they were members of the Communist Party of the United States.

As to each petitioner the respondent set forth in an affidavit, executed by him and attached to his return, a recital of information he claimed to have as to statements, speeches, publications and attendance at or participation in meetings by each petitioner, in each instance affecting and relating to either the Communist Party or other organizations "designated by the Attorney General as Communist", including the Civil Rights Congress, the American League for Peace and Democracy, the People's Educational Center, the League of American Writers and the American-Russian Institute. As to petitioners Stevenson, Hyun, and Carlisle, these activities were past only, the most recent in date being in the year 1948 as to petitioner Stevenson, and 1949 as to both petitioners Hyun and Carlisle.

Upon the basis of these activities on the part of each petitioner, summed up in the concluding sentence in each of the returns as "tending to establish the said petitioner's current affiliation with and activity on behalf of the Communist Party", the Acting Commissioner of Immigration and Naturalization for the Attorney General, concluded as to each petitioner

> "that if the said petitioner were enlarged on bail he would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States." (R. 44; 93; 133; 164).

The District Director in his return and affidavits made no claim whatever of the commission of any unlawful act by any of the petitioners. He did not dispute that while at

liberty under bond each had always appeared when required in the deportation proceedings and, if enlarged, would continue to be available and answerable.

The District Court, this time without written opinion, again held the District Director's justification sufficient, denied each of the petitions for habeas corpus and discharged each of the writs (R. 65; 107; 144; 175).

Upon appeal the court below affirmed. It ruled that while the statutory power of the Attorney General to grant or withhold bail pending deportation was not an arbitrary or unreviewable power, it was not limited to the object of securing the appearance of the alien in the deportation proceeding but included the authority claimed by the Attorney General to imprison for "protective custody purposes". It held that petitioners might be taken upon the record to be members of the Communist Party and that the Attorney General without other proof might hold them in detention without bail upon that ground alone. This ruling it justified upon "the legislative findings set out in the Internal Security Act of 1950," supplemented by judicial notice.

Summary of Argument

Petitioners contend (1) that the refusal of bail to them, upon the record here, was arbitrary and capricious, and deprived them of their liberty without due process of law; (2) that Sec. 20(a) of the Immigration Act of 1917, as amended, is a bail statute, and the denial of bail to petitioners where their availability in the deportation proceedings was not in dispute was an abuse of the discretion vested in the Attorney General by the statute and a denial of their right to reasonable bail under the Eighth Amendment to the Constitution.

I. Denial of Bail to the Petitioners, upon the Record Here, Was Arbitrary and Capricious and Deprived Them of Their Liberty Without Due Process of Law.

In this case, the Attorney General[3] rearrested these petitioners and held them without bail pending deportation proceedings upon the ground—and only upon the ground—that he had in his possession evidence "tending to establish" each petitioner's "current affiliation with and activity on behalf of the Communist Party" (R. 44, 93, 134, 164). We argue below that, under the applicable statute and the Eighth Amendment to the Constitution, refusal of bail upon any ground other than fear of the alien's non-appearance in the main proceeding is unauthorized and violative of constitutionally protected liberties. Even assuming, however (as we do only for purposes of argument), that consideration of factors other than answerability was permissible, we submit that the imprisonment of petitioners upon the record here was an act of capricious and unconscionable tyranny. The time has not yet come, we believe, when any person—citizen or alien—can be thrown into jail and held without right to bail merely because he is, or is thought by an administrative officer to be, a Communist, a Republican, an atheist or a technocrat. See *U. S. ex rel. Potash* v. *District Director* (C. C. A. 2, 1948), 169 F. 2d 747; *U. S. ex rel. Pirinsky* v. *Shaughnessy* (C. C. A. 2, 1949), 177 F. 2d 708.

As this Court has indicated on numerous occasions, aliens under the Constitution have the same rights, liberties and protections which citizens have except that aliens, unlike citizens, may be held liable to deportation. The foreign-born are entitled to the safeguards of the Constitution and

[3] In this brief the respondent is variously and interchangeably referred to as the Attorney General since the former is the ultimate delegee in the chain of authority extending from the Attorney General down through the Commissioner of Immigration and Naturalization to the district director. 8 U.S.C. secs. 101, 102; 8 C.F.R. 150.6.

to the protection of the laws in regard to their rights of person and of propery. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the seal of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." *Ex parte, Milligan,* 4 Wall. (U. S.) 2, 120.

Aliens thus are persons within the meaning of the Constitution and secured of all rights not limited explicitly to citizens. *Bridges* v. *California,* 314 U. S. 252; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Schneiderman* v. *U. S.,* 320 U. S. 118; *Bridges* v. *Wixon,* 326 U. S. 135, 148. See also, Note, 68 L. Ed. 255, 270. In a nation of immigrants it would be anomalous if the foreign-born should not enjoy the very liberties for which the earliest comers established a home here. While they have not always been welcomed, as the scheme of our immigration laws reminds, once domiciled here the alien may lay full claim to the benefits of most of the guarantees of the Bill of Rights.

This Court has uniformly held that proceedings which seek the deportation of aliens must conform to the due process requirements of the Fifth Amendment to the Constitution of the United States. To hold otherwise would indeed violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U. S. 105.

The reasons for this requirement lie in the drastic character of expulsion from one's adopted home. This Court has repeated on a number of occasions the seriousness with which it views "the doom of deportation" for those whose lives have been intimately tied to this country. It has described deportation as the loss "of all that makes life worth living", *Ng Fung Ho* v. *White,* 259 U. S. 276, 284; as

"the equivalent of banishment or exile", *Delgadillo* v. *Carmichael,* 332 U. S. 388, 391; as "the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 10. See also *Bridges* v. *Wixon,* 326 U. S. 135, 147.

Thus where, in a deportation proceeding, the evidentiary rules of procedure were disregarded by administrative officials so as to make the proceedings essentially unfair, this Court held that the deportation order could not stand under the Fifth Amendment. *Bridges* v. *Wixon,* 326 U. S. 135, 150. And, in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, this Court stated (page 50):

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberties and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself, it might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

Due process of law, "representing a profound attitude of fairness between man and man, and more particularly between the individual and govt," Mr. Justice Frankfurter, concurring, *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 95 L. Ed. (Adv. Ops.) 556, rejects the thought that any person, alien or citizen, may be subjected to the dictate of the executive.

> "This court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental

principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution." *The Japanese Immigrant* case, 189 U. S. 86, 100-101.

If the requirements of procedural due process must be met in any deportation proceeding, can it be doubted that the denial of freedom upon reasonable bail to a person pending deportation hearing falls within the purview of the same constitutional interdiction, especially when such is grounded upon arbitrary assumptions reached ex parte? It is manifest that Congress may not constitutionally delegate such unbridled power to any official of government. The alleged plenary power of Congress with respect to the deportation of aliens does not include the power to deprive aliens arbitrarily of their liberty. Certainly, lawful powers may not be used for unconstitutional ends. *Lake Shore* v. *Smith*, 173 U. S. 684, 689; *United States* v. *Butler*, 297 U. S. 1, 68; *Western Union Telegraph Company* v. *Foster*, 247 U. S. 105, 114.

It is maintained, however, that the discretion to grant or deny bail under the law as applied here rests upon a special foundation. We are told that the justification for refusal of bail in this case, incarcerating the petitioners here for a period of indefinite duration, is to protect the "national security." It is not contended, therefore, that the discretion of the Attorney General has been exercised to subserve the purpose of bail in its traditional sense. What has been done here is to use a statute dealing with bail as a means of imprisoning persons who are alleged by an executive officer to be aliens and members of the Communist Party. It is respectfully submitted that this action of an executive officer does violence to those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana*, 272 U. S. 312. Compare *Palko* v. *Connecticut*, 302 U. S. 319:

"For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Yick Wo v. *Hopkins* (1883), 118 U. S. 356, 370.

In the proceedings here the Attorney General has taken a bail statute and applied it in such a manner as to arbitrarily deprive these petitioners, as a class, not only of their employment (*Truax* v. *Raich*, 239 U. S. 31) but of their liberty as well. It is doubtful that the Attorney General would contend that any arm of government would have the right to deny bail to any citizen, in criminal or civil proceedings, upon the sole claim that he is asserted to be a member of the Communist Party and as such, a danger to "national security." But if the statute should be construed as respondent argues, then there are no bounds to his discretion and he could exercise this awesome power for political purposes or upon mere whim and caprice. It is not too much to say that if such a result were reached, it would place an executive officer in a position above government and the Constitution itself. "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States* v. *Lee*, 106 U. S. 196, 220.

The terms of the statute, as we will show below, do not purport to vest any such arbitrary power in the Attorney General. It is the Attorney General himself who has so construed the law as to include the power to detain aliens allegedly members of the Communist Party for "security purposes". In order to support this arrogation of authority the Attorney General points to the "legislative findings"

of the Internal Security Act of 1950. But the constitutionality of the Internal Security Act is not before the Court in this present proceeding. No deportation order under that Act is involved in these proceedings. On matters involving the constitutionality or validity of statutes enacted by the legislature, courts often do search for legislative intent, but the determination of a judicial question is dependent upon a hearing and evidence adduced before the body which is making the judicial determination. The Attorney General is vested, under the plain terms of the law, with a discretion to determine to grant or deny bail in the light of the common law principles and facts relating to the particular individual involved. The fact that a legislature has conducted an investigation and allegedly found facts to warrant the enactment of a law does not justify a court or administrative official arbitrarily depriving a person of his liberty without facts personal to the individual and in violation of freedoms secured by fundamental principles of law. See *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Manley* v. *Georgia*, 279 U. S. 1; *Morrison* v. *California*, 291 U. S. 82; *Tot* v. *U. S.*, 319 U. S. 463.

As this Court stated in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. . . .
>
> "The nature of the final act determines the nature of the previous inquiry. As the judge, bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it cannot be judicial in the

practical sense, although the questions considered might be the same that would arise in the trial of a case."

See also *Tot* v. *U. S.*, supra, *Morrison* v. *California*, supra. Here, without the facts and solely upon the basis of "legislative findings", an administrative official has deprived persons of bail in the face of a clear showing of their right to it, under color of a phrase, "national security". If this can be done by the executive arm of the government exercising the judicial function of granting or denying bail, then the constitutional provision which forbids the deprivation of a person's liberty without due process of law will become a dead letter. The power of the courts to protect citizens and aliens alike from invasions of their constitutional rights will be clearly ended, for the precedent once established will mean that governmental action, no matter how arbitrary, can always be sustained upon the basis of "legislative findings". Thus, that which the statute makes discretionary would be converted into an automatically preordained result predicated on legislative fiat.

If under the law bail can be denied at all, denial in any case must be founded upon evidence of material facts relating to the particular alien. The legislative finding constitutes no evidence of what any individual alien did. At most, the legislative findings may be referred to for guidance in resolving ambiguity. But here they are treated as findings of fact and applied against the petitioners as individuals. Thus, to deny bail upon the legislative findings in this case is to base the denial upon the assumption that the charges against the petitioners are true. The petitioners are thereby placed in the position of having to prove falsity of the charges in order to secure their release on bail for the purpose of preparing for the hearing of those charges.

This is a case involving the right to bail of four human beings. It affords no proper occasion to classify them as members of a particular group. To condemn them by branding the group without notice or proof is tyrannous.

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."

Joint Anti-Fascist Refugee Committee v. *McGrath*, 95 L. ed. 556 (Frankfurter, J., concurring).

This Court has recently declared that "... one may not be imprisoned or executed because he holds particular beliefs." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 408. *United States ex rel. Potash* v. *District Director*, supra, 169 F. 2 747; *United States ex rel. Pirensky* v. *Shaughnessy*, supra 177 F. 2 708. Yet it is solely for their claimed political beliefs that these petitioners were imprisoned. All of their specific activities, relied upon by respondent as justifying imprisonment—speeches, writings, participation in meetings—were expressions of their beliefs. These are protected by the First Amendment and thus removed from scrutiny or consideration by the Attorney General as factors bearing upon petitioners' right to bail. *Williamson* v. *United States*, 95 L. ed. (Adv. Ops.) 10; *Bridges* v. *United States*, supra, 184 F. 2 881.

Tested by his own premises, therefore, the action of the Attorney General in this case defies both reason and fairness. Whatever the limits of his discretion in this matter, it is a discretion that has been given him, not an autocratic power. Discretion, at the minimum, means the exercise of authority "in a reasonable manner to attain a legitimate end." See *Federal Radio Commission* v. *Nelson Bros.*, 289

U. S. 266. But no rational relation has been shown or can be found between the circumstances of these petitioners and their *sine die* imprisonment. It is submitted that the refusal of bail here was a gross abuse of any granted power.

II. Sec. 20 (a) of the Immigration Act of 1917, as Amended, Is a Bail Statute, and the Denial of Bail to These Petitioners Where Their Availability Was Not in Dispute, Was an Abuse of the Discretion Vested in the Attorney General by That Statute, and a Denial of Their Right to Reasonable Bail under the Eighth Amendment to the Constitution.

The right to bail, protecting the liberty of the accused during any proceeding against him, expresses the deep abhorrence of our law for all imprisonment not adjudged as punishment. Devised as a means of securing the presence of the party at the principal proceeding, (*Ex parte Milburn*, 9 Pet. (34 U. S.) 704), bail is favored at all stages of the case.

It is a principal buttress of the right of every person to the fullest opportunity to defend himself and to be presumed innocent until the due processes of the law prove otherwise.

> "The presence of bail before trial is to insure the presence of the accused when required without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be given effect."
>
> *U. S. ex rel Rubinstein* v. *Mulcahy*, (C. C. A. 2, 1948), 153 F. 2nd, 1002, 1004.

Bail thus is ancillary to the main proceeding, designed to facilitate and effectuate it. Like property attachment, which gives way upon the posting of proper bond, bail is an essentially mechanical arrangement made to secure a mechanical end—the availability to process of the personal

subject of the action. Its role is the same in civil and criminal proceedings. Cf. 11 U. S. C. A. sec. 28 (distraint of bankrupt). Its prime purpose always is to preserve liberty.

A. *Background of the Present Statute*

Until 1907 the statutes dealing with expulsion of aliens contained no express provision for allowance of bail in deportation cases. Some courts did find in an earlier act prohibiting bail specifically in Chinese exclusion cases[4] strong implication of the intention that bail should be available in other types of immigration cases (*Ex parte Ah Tai*, D. Mass., 1903, 125 F. 795). Most courts, however, required more explicit evidence that Congress desired to authorize bail pending deportation. See *U. S. ex rel Carapa* v. *Curran* (C. C. A. 2, 1924), 297 F. 946. So doubtful was the majority that they declined to assert any power in the courts themselves to admit to bail in habeas corpus proceedings brought by aliens held for deportation, notwithstanding the lead given by *Wright* v. *Henkel*, 190 U. S. 40; *Chin Wah* v. *Colwell* (C. C. A. 9, 1911) 187 F. 592.

More than ordinary significance attaches, therefore, to the inclusion of express authority for allowance of bail in expulsion proceedings in sec. 20 of the Act of February 20, 1907 (34 Stat. 898, 904-5). The provision was as follows:

> "Pending the final disposition of the case of any alien so taken into custody, he may be released under a bond in the penalty of not less than $500 with security approved by the Attorney General, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States."

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[4] Act of May 5, 1892; Comp. St. sec. 4319.

Its obvious purpose was to permit the alien's release on such terms as would insure his appearance at the administrative hearings and his availability for ultimate deportation. The plain intent of the legislation was to provide for acceptance of appropriate security in lieu of even "temporary confinement" pending expulsion proceedings, in accordance with the traditional practice in criminal cases.

Ten years later, this original bail statute was re-enacted without change as a part of sec. 20 of the Act of Feb. 5, 1917 (39 Stat. 890). Since this measure constituted a major codification of the immigration laws and the principal deportation statute, inclusion of the bail provision evidenced a purpose that no alien in any deportation proceeding should be kept in custody if he could furnish satisfactory security for his appearance.

The bail provisions of sec. 20 of the 1917 Act were never considered by this Court prior to their amendment on September 23, 1950 by sec. 23 (a) of the Internal Security (McCarran) Act (Pub. Law 831, 81st Cong. 2d Sess., c. 1024). Indeed, from the small number of cases involving application of the provisions, it may be assumed that bail was ordinarily allowed in deportation cases as a matter of course.

In *Prentis* v. *Manoogian*, (C. C. A. 8, 1926) 16 F. 2d 422, a Circuit Court of Appeals construed the bail proviso for the first time. There an alien was held by the Secretary of Labor without bail pending disposition of expulsion proceedings against him. The Secretary justified upon the ground that no inherent right to bail exists in such proceedings, independently of the statute, and that his discretion under the proviso was complete and final. The court agreed to the first proposition but rejected the second. It held that the immigration authorities, under the terms of the statute, had no power to deny bail and that the permissive language of the proviso was for the benefit of the

alien alone. If he chose to invoke it, the court concluded, and satisfied the statutory condition by offering reasonable security for his appearance he was entitled to his liberty as a matter not of inherent, but of statutory, right.

No other case has gone so far. But the two other leading decisions antedating the McCarran amendments, both from the Second Circuit, read the statute as conferring upon the Attorney General (successor to the Secretary of Labor, Reorg. Plan No. V., June 14, 1940, 5 Fed. Reg. 2423) a discretion "to be reasonably exercised" with regard to the circumstances of each case, and on facts closely analogous to those here held denial of bail to be an abuse of discretion. *United States ex rel. Potash* v. *District Director* (C. C. A. 2, 1948), 169 F. 2nd 747; *United States ex rel Firinsky* v. *Shaughnessy* (C. A. 2, 1949), 177 F. 2nd, 708.[5] See also *Zydok* v. *Butterfield* (C. A. 6, 1951), 187 F. 2d 802; *United States ex rel. Heikkinen* v. *Gordon* (C. A. 8, 1951), 190 F. 2nd (Adv. Ops.) 16.

B. *The Statute Requires Release of the Alien On Reasonable Bail Unless his Presence Cannot Be Thus Assured.*

In assaying the scope and operation of the bail power under the deportation statute it is necessary to recall the close correspondence in many important respects between expulsion and criminal proceedings. Not only may deportation result in the loss of "all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U. S. 276, 284. Expulsion proceedings, like criminal, are initiated by the issuance of a warrant of arrest upon probable cause, 8 C. F. R. 150.4. Upon service of the warrant the alien is taken into custody, subject to release on bond in accordance with the statute.

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[5] An earlier decision of that court, *United States ex rel. Zapp* v. *Dist. Dir.* (1941) 120 F. 2nd 762, had rejected the doctrine of *Prentis* but did not decide the nature and extent of the discretion because the issue was not presented.

8 C. F. R. 150.5 (b), 156. Misconduct of some kind is the basis of the charge. The presumption of innocence obtains and the burden of establishing guilt rests upon the government. *Hughes v. Trapello* (C. C. A. 3, 1924) 296 F. 306; *Werrman* v. *Perkins* (C.A. 7, 1935) 79 F. 2d 462. Due process of law must be accorded. *United States ex rel. Tisi* v. *Tod*, 264 U. S. 131; *Wong Yany Sung* v. *McGrath*, 339 U. S. 33; *United States ex rel. Vajtauer* v. *Commissioner of Immig.*, 273 U. S. 103. The alien is entitled to the aid of counsel. *Chew Hoy Quong* v. *White* (C. C. A. 9, 1918) 249 F. 869; *Ex parte Eguchi* (D. C. S. D. Cal., 1932) 58 F. 2d 417. Deportation in every human sense is punishment of the severest character. *Fong Haw Tan* v. *Phelan*, 336 U. S. 6; *Jordan* v. *DeGeorge*, 95 L. ed. (Adv. Ops.) 648.

It follows that the considerations favoring allowance of bail in criminal cases are no less present in deportation. The innocent alien is as much to be protected from imprisonment before trial and decision in expulsion proceedings as in criminal prosecutions; otherwise much of the protection of the presumption of innocence is lost. See *McKnight* v. *United States* (C. C. A. 6, 1902) 113 F. 451; *United States* v. *Motlow*, 10 F. 2d 657. Equally pressing in both classes of proceedings is the necessity for liberty in order to prepare for defense. See *Fong Fook* v. *Wixon* (C. C. A. 9, 1948), 170 F. 2d 245. Equally cogent in both is the interest of the state in minimizing the costs of the proceedings. *State* v. *Reed* (1923), 127 Wash. 166, 219 Pac. 833. The paramount element, common to both, is the right of all persons to their liberty pending appropriate adjudication that misconduct has forfeited it. So long as the state's interest in the availability of the person is properly secured, that right retains its preferred place under our constitutional system.

In this framework, the factors to be considered in allowing bail in deportation proceedings are seen to be similar,

if not identical, to those governing in criminal cases. See Fed. Rules of Criminal Procedure, Rule 46 (c).

> "The reasonableness of the amount is to be determined by properly striking a balance between the need for a tie to the jurisdiction and the right to fredom from unnecessary restraint before conviction under the circumstances surrounding each particular accused. *Moore* v. *Aderhold, Warden*, 10 Cir., 108 F. 2d 729, 731; *Connley* v. *United States*, 9 Cir., 41 F. 2d 49, 50; *Bennett* v. *United States*, 5 Cir., 36 F. 2d 475. Consideration should be given to the seriousness of the crime charged, the past record and recent action of the accused as bearing upon his good faith in appearing for trial and his financial ability to procure bail."
>
> *United States ex rel. Rubinstein* v. *Mulcahy* (C. C. A. 2, 1946) 155 F. 2d 1002, 1004.

The court below, however, held that Sec. 20 of the 1917 Act as amended by the McCarran Act permits denial of bail on grounds other than fear of non-appearance. The relatively minor changes in the language of the statute support no such conclusion. By the amendment the discretion of the Attorney General was made explicit and was particularized to include continuation of custody. In his Memorandum for the Respondent In Opposition To Application Before Mr. Justice Douglas For Bail Pending Petition For Writ of Certiorari in this case (p. 5, n. 2), the Solicitor General has suggested that in all probability this was aimed at the ruling of the Eighth Circuit in *Prentis* v. *Manoogian*, supra, 16 F. 2d 422 and disapproves the holding of that case that the bail power of the immigration authorities is limited to determining the amount of the bond. Certainly the new language no more than the old authorizes denial of bail where, admittedly, no fear is claimed that the alien may abscond. It declares merely in plainer terms that bail may be refused in the extreme case where the Attorney General

finds, on evidence, that no bond the alien can furnish will secure his appearance for the deportation proceedings. See *United States ex rel. Heikkinen* v. *Gordon* (C. A. 8, 1951), 190 F. 2d (Adv. Ops.) 16; *Zydok* v. *Butterfield* (C. A. 6, 1951), 187 F. 2d 802.

Sec. 20 thus was and is a bail statute. The authority it grants applies "pending final determination" of deportability and is in aid of that process. It does not, because under our Constitution it could not, authorize whimsical refusal. It permits denial only where the circumstances shown to prevail in the particular case reasonably justify fear that jurisdiction of the alien may be lost. Such circumstances admittedly are lacking here and in their absence petitioner's detention is tyrannous and indefensible.

C. *Denial Of Bail To The Petitioners Under The Circumstances Shown By This Record Was An Abuse Of The Statutory Discretion*

Measured by the underlying purposes of bail, so plainly adopted in the statute, the denial of their freedom to these petitioners, pending their deportation hearings, was arbitrary and tyrannous. Each of them had been previously arrested and released on modest bail fixed by the same agency (R. 45; 95; 135; 166). Admittedly each has an unblemished record of response to every request for his appearance (R. 5-6, 49; 73; 99; 156; 170; *semble* 115-16, 139). Respondent does not claim to fear that they will abscond or fail to hold themselves available to him in the future as they have in the past. He does not claim that any of the circumstances which existed when bond was allowed are different now. These facts alone should be conclusive of their right to release under the statute.

But each of the petitioners is bonded within the respondent's jurisdiction by the strongest human ties. Carlson,

now 37, has lived in the United States since he was six, and in California for the past fifteen years. His petition for naturalization was blocked by the initiation of the deportation proceedings. He is married to a native-born citizen, is the father of two children born in California, and has lived with his family in Los Angeles since 1949 (R. 3).

Mrs. Stevenson was born in England in 1907, migrated to Canada with her family as a child and has lived in this country since 1923. Married to a native-born citizen and the mother of a child born here, she has been a resident of Los Angeles continuously since 1928 (R. 70-71).

Hyun grew up in Hawaii where he was taken by his family from his birthplace in Korea at the age of seven. He attended high school there, with distinction, and was graduated from the University of Hawaii in 1940. Despite the handicap of alienage he became a captain in the University's Reserve Officers Training Corps and president of a fraternity. During the war years, although excluded from military service, he was employed as a civilian worker by the United States Engineer Corps and took active part in civilian defense. Having been married to an American citizen, he came with his wife and their two children to Los Angeles, where he has been continuously employed as an architect and draftsman since 1947. He has twice sought American citizenship, denied because of his Korean birth. (R. 117-19).

Carlisle, like Mrs. Stevenson, is a native of England, born in 1897. He has lived in the United States continuously since 1920, for the past fifteen years in the County of Los Angeles (R. 154).

The petitioners thus are stable and established residents of this country and of the community where they were seized last October. Their average residence here is more than twenty-three years or, if Hyun's years in the Hawaiian

Islands are included, twenty-nine years. All of them have lived in California for substantial periods, fifteen years or more except in the case of Hyun. Three have married and acquired families with whom they are now living. All have been available, without exception, when called by the respondent.

Under these circumstances there is no possible justification for holding these petitioners without bail. The Attorney General asserts the right to confine them in the interest of "national security". But the statute gives him no such authority. It is a bail statute giving only such power as is "necessary to give effect" to the deportation laws (*Wong Wing* v. *United States*, 163 U. S. 228, 235) and no other. It is not a license to the Attorney General to quarantine anyone of whom he disapproves.

D. *Construed Or Applied To Permit Refusal Of Bail Under the Circumstances Here, The Statute Deprives Petitioners of Their Right To Reasonable Bail Under the Eight Amendment.*

It can hardly be contended that petitioners could have been jailed without bail by the Attorney General had they been citizens. The power is claimed, so it seems, solely because they are not. Yet their right to freedom from arbitrary treatment stands no lower in the scale of constitutional liberties than does that of citizens. *Jordan* v. *DeGeorge*, 95 L. ed. (Adv. Ops.) 648; *Bridges* v. *Wixon*, 326 U. S. 135.

> "For the inalienable rights of personal security and safety, orderly and due process of law, are the fundamentals of the social compact, the basis of organized society, the essence and justification of government, the foundation, key, and capstones of the Constitution. They are limited to no man, race, or nation, to no time, place, or occasion, but belong to man, always, every-

where, and in all circumstances. Every nation demands them for its people from all other nations. No emergency in war or peace warrants their violation, for in emergency, real or assumed, tyrants in all ages have found excuse for their destruction. Without them, democracy perishes, autocracy reigns, and the innocent suffer with the guilty. Without them is no safety, peace, content, happiness, and they must be vindicated, defended, and maintained in the face of every assault by government or otherwise. All judgments based upon their violation must be set aside."

Ex parte Jackson (D. C. Mont., 1920) 263 F. 110, 113; app. dismissed 267 F. 1022 (C. C. A. 9. 1920)

The Eighth Amendment forbids the exaction of excessive bail not merely from citizens but from all who enjoy the safeguards of the Constitution. It is a limitation upon federal power. See *In Re Kemmler* (1890) 136 U. S. 436. Nor is it applicable in terms merely to criminal proceedings. Its mandate is unqualified. "Excessive bail shall not be required." The reason for its command—to implement due process of law and the presumption that every man is innocent until the contrary has been proved—has equal cogency in relation to deportation cases, where the stakes for the individual are no less high. *Fong Haw Tan* v. *Phelan*, 333 U. S. 6; *Delgadillo* v. *Carmichael*, 332 U. S. 388.

"If, then, it be unlawful under our system to deprive any person of his liberty by fixing excessive bail, which he cannot give, a fortiori it would seem also unlawful to deprive him of his liberty by refusing bail altogether. In the absence of mandatory provisions, such would inevitably be the conclusion of an American court in a justiciable case, if the legal rights or constitutional privileges of an American citizen were involved. This would be true also if in such a case the legal rights of an alien were in issue."

United States v. *Fah Chung* (D. C. S. D. Ga., 1904), 132 F. 109, 110

Recognizing these considerations, more than one court has found in the Eighth Amendmnt a guide to the limits of the bail power under sec. 20 of the Immigration Act of 1917.

Thus in *United States ex rel. Potash* v. *Dist. Dir.*, supra, 169 F. 2d 747, 752, the Court of Appeals for the Second Circuit declared:

> "If the Eighth Amendment to the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that Amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonableness we have set forth regarding the exercise of discretion by the Attorney General are observed."

An even clearer statement appears in the opinion of District Judge Ryan in *United States ex rel. Klig* v. *Shaughnessy* (D. C. N. Y. 1950), 94 F. S. 157, 159-60, holding the denial of bail to aliens under circumstances in all respects analogous to those shown by petitioners here to be "arbitrary and an abuse of discretion on the part of the Attorney General":

> "It is not inappropriate to refer here to the Eighth Amendment to the Constitution of the United States, one of that series of amendments collectively known as the Bill of Rights, which prohibits the imposition of excessive bail. *Certainly, the principle inherent in that amendment applies to deportation proceedings, whether or not such proceedings technically fall within its scope.* That principle cannot be reconciled with the government's denial of bail to these relators under the circumstances here set forth." (Italics supplied).

The grant of bail is a judicial function, requiring the weighing of fact and circumstances found to bear on the

individual applicant. *United States ex rel. Pirinsky* v. *Shaughnessy* (C. A. 2, 1949) 177 F. 2d. 708. Variations among men being infinite, the complex of ties and interests attached to them is equally various. In the exercise of an informed discretion the bail authority must of necessity take note of these individual differences.

These petitioners, however, of varying backgrounds and social status, are victims of an administrative edict which at one stroke cut off their liberty and that of some two-score others.[6] In each instance the government's justification was a standard form of radiogram message reciting in monotonous refrain:

> "For your information and that of United States Attorneys and aliens and their attorneys the instruction to you of October twenty-first to take into custody and detain the alien Communists was issued only after the cases had been examined in the light of the Internal Security Act of Nineteen Fifty and the spirit and intention thereof and all of the factors concerning the likelihood of the deportability and the activities of said alien had been given careful consideration as well as the factors of undue hardship which continued deten-
> (fol.52) tion might impose Stop As you have already been instructed the hearings and steps towards disposition of these cases are to be given top priority Stop Also as you have been advised these aliens were ordered detained by authority of the Attorney General delegated to me by section nine zero point one of title eight CFR paren twelve fr five zero seven two July thirty one Nineteen Forty Seven paren under section thirty seven of the Alien Registration Act of Nineteen Forty comma eight USC four five eight.") (R. 42-3)

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[6] See Appendix B to Petition for Writ of Certiorari herein, listing other cases in which aliens were arrested, on the same grounds as these petitioners, and denied bail by the Attorney General upon the same grounds.

Here is the negation of discretion, defined as the conscientious application of reasoned judgment to particular facts for a permitted end. Cf. *Fed. Radio Comm.* v. *Nelson Bros.*, 289 U. S. 266. This is administrative fiat, cutting as indiscriminately as a scythe across the myriad circumstances of many lives. Indeed, it is doubtful that the Attorney General troubled to inquire as to the particulars of the individuals who fell in his path. At least in his supplemental returns the district director disclaimed information and belief on this score as to each of the petitioners. (R. 55; 99, 139; 171). Treated arbitrarily as members of a single class, a classification having no bearing on their amenability to the deportation process, the petitioners were swept into jail, anonymous figures in a nationwide "roundup".

> "The Attorney General is certainly not immune from the historic requirements of fairness merely because he acts, however conscientiously, in the name of security."
>
> Frankfurter, J., *Joint Anti-Facist Refugee Committee* v. *McGrath*, 95 L. ed. (Adv. Ops.) 556.

Upon this record it is manifest that the Attorney General has turned his bail power against the petitioners in reprisal for what he believes to be their activities and opinions, of which he disapproves. But bail may not be used for punishment, whether on account of expressed views, political activities or otherwise. Mr. Justice Jackson, *Williamson, et al.* v. *United States*, 184 F. 2d 881; *Bridges* v. *United States* (C. A. 9, 1950), 184 F. 2d 886; P. ex rel. *Sammons* v. *Snow*, 340 Ill. 464, 173 N. E. 8, 72 A. L. R. 798; *United States ex rel. Heikkinen* v. *Gordon*, supra, 190 F. 2d (Adv. Ops.) 16.

> "Generally speaking it is not the purpose of the criminal law to confine a person accused of crime before his conviction . . . . Clearly, it is not the function of bail

to prevent the commission of crimes between indictment and trial; and manifestly admission to bail is never a judicial license to continue the commission of crime."

United States v. *Foster et al.*, (D. C., S. D. N. Y., 1948) 79 F. Supp. 422, 423.

Since the purpose of bail is solely to secure the presence of the accused, punitive considerations have no place in the determination as to the grant or the amount of bond. To give them weight is to render the bail *ipso facto* excessive under the Eighth Amendment. Construed as authorizing such practice, the statute here fails the test of that Amendment.

Conclusion

What emerges from the record in this case is an example of discretion abdicated, of power turned to an unauthorized and improper end. Ancient concepts of fairness and historic experience with tyranny alike repudiate the claim that our scheme of law permits it. The Constitution is "more than a silent, anemic witness to this proceeding" (*Bridges* v. *Wixon*, 326 U. S. 135, 159). Both statute and Constitution require that the liberty of these petitioners be restored to them.

Wherefore, petitioners pray that the judgment of the Court below be reversed and that this Court order that petitioners be enlarged upon bail in the sums accepted by the Immigration Service before their rearrest.

Respectfully submitted,

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